1948. K File No. O.B.C.S. RJ/48

Legal DEPARTMENT

A BRANCH

subject:— O.B.C.S. RJ.

Opinions under the Bombay Civil Services Rules.

No. O.B.C.S-RJ/48

Slip 24 B a.

115-A

Local Department File No. G. D. C. S. 22 of 1940.

1940.

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M. R. R.
7-4-56.

9/4/56 7/4/56

CONFIDENTIAL.

Office of the A. I. A.

The facts as stated in the letter from the Director of Public Instruction, Poona, No.S-20(a)-D dated the 27thAugust 1940, have to be taken into account in deciding how far a suit by Mr. Barki would now be tenable. The facts show that on one pretext or another Mr Barki ~~maintained~~ was practically on leave for over a year from June, 1939 and that finally on the 31st May 19[illegible] he left Dhulia, where he was posted, without the sanction of the Deputy Educational Inspector; that he sent a false telegram on the same date reporting sickness but on that very day he applied for leave to visit Pandharpur.
In all his letters he deliberately avoided giving his address or communicating his whereabouts so that the telegram and the registered letter sent to him asking to resume duty by the 15th of July were returned undelivered. On the 15th of July, however, a telegram was received from him by the Deputy Educational Inspector, Dhulia, asking for an extension of leave.

2. On these facts the Director of Public Instruction was justified in holding, as he actually did, that Mr. Barki left duty without permission and failed to keep his superior officer informed of his whereabouts and to furnish him with his address; that he failed to comply with the D.E.I.'s order to rejoin duty on the 15th of July, and that his alleged failure to do so on the grounds of health was unacceptable in view of his altogether unreliable conduct throughout. It is on these grounds that the D. E. I. passed order that Mr. Barki was considered as self discharged.

3. Apart from the question whether an order in these terms is strictly justified by the Bombay Civil Services Conduct, Discipline and Appeal Rules and whether the D. P. I. was competent to pass such order, what we have now to consider is, can Mr. Barki successfully maintain an action against Government for wrongful dismissal? In my opinion it would be almost impossible for him to do so by reason of the bar of limitation and the facts just recapitulated.

4. In order to enable a servant to maintain an action for wrongful dismissal, he must be ready and willing to continue in his master's service at the time he is discharged. Readiness does not necessarily mean actually offering himself for service but can be provid in any other way. It is obvious, however, that an offer to discharge his duty is the best proof of the servant's readiness to do it. And, as readiness and willingness is a matter that is within his mind only, the master ought at least to have notice of it (Smith's Law of Master and Servant, 8th Edition, p. 122). In this case the facts hardly leave room for any doubt that Mr. Barki was not ready and willing to perform his duty. In the case of Ganesh V. G. I. P. Railway Company (2. B. L. R. p. 790) the plaintiff, a ~~station~~ station master in the Company's service, proceeded on the 14th February on three months' leave without pay. On the 5th May he wrote to the Company expressing his unwillingness to serve any longer and asking them to accept his resignation within 24 hours. No answer was sent to this and the plaintiff did not return to duty on the 14th May, i. e., on the expiration of his leave. Subsequently, ~~on or about~~

on or about the 19th May, the plaintiff was served with a notice dated the 13th May that he was dismissed from service. In his judgment Sir Lawrence Jenkins said, "Supposing he had not been on leave, but while in the active performance of his duty he had left his employment contrary to his obligations, could it then be said that he had terminated his contract of service so that he was not liable to dismissal? Surely Not. Nor can I see that the accident of his being on leave makes any difference." It was finally held that on the 13th Of may there was an anticipatory breach which in the event entitled the Company to determine the contract by dismissing the plaintiff. The facts in the present case are stronger still. By his continuous conduct of persistent failure to resume duty and abusing the indulgence, which was repeatedly shown to him, of extending his leave from time to time and by his insistence that he he was determined to take leave, even unauthorizedly, for the purpose of attending pilgrimages, and finally by his withdrawal from duty after the 31st May 1941 till the 15th July and refusal and failure to resume duty after that date though invited to do so, Mr. Barki made it abundatly clear that he was not ready and willing to serve. That would have been sufficient reason for dismissing him from service. It is doubtful whether such dismissal, which was not of the character of a disciplinary measure but followed upon the breach of a contractual obligation, needd necessarily have been brought about by following the procedure laid down in the Bombay Civil Serrvices Conduct, Discipline and Appeal Rules. Even if that strict procedure was indispensable, Mr. Barki would not be able to maintain the proceedings for wrongful dismissal when the facts show that he was not ready and willing to continue in service.

5. There is, in addition, the insuperable bar of limitation as explained in the H. L. A's opinion No. 350-Confl., dated the 23rd August 1947.

6. In those circumstances, there is no reason now at this late stage to disturb the order made by the H. P.I and to direct an inquiry with a view to take disciplinary action.

7. Whether the pension granted to Mr. Dani should be cancelled is a matter for the Department to decide.

8. This advice is being tendered after personal consultation with H. M. (Law)

sd/-
O. C. 20/1/48.

Remembrancer of Legal Affairs,

U. O. to S A I. P. H., 45 Confl., dated the 20th January 1948.

H. S. S.:
7/4

Termination of service — absence for about a year.

D. C. R. Rules.

Office of the A. L. A.

No order terminating the services of a Government servant can be made with retrospective effect. What Government should do in the present case is to terminate the services of the Excise Havildar, Mohammad Yusuf Suleman and to treat his absence from the date of expiry of his leave till today(i. e. the date of termination of his services) as leave without pay.

sd/-

20/6

GO

Remembrancer of Legal Affairs.

M. R. to D. O. No. 6133, dated the 1st July 1943.

No.0/12733-H.
Agriculture and Rural
Development Department.
Bombay Castle, 16th July, 1940.

From

The Assistant Secretary to the Government of Bombay,
Agriculture and Rural Development Department.

To

A. G. Shaikh, Esquire,
C/o. Vinchani, district Thana.

Subject:- Refund of the amount of Rs. 340
recovered as penalty.
Request for--

Sir,

I am directed to refer to your petition dated the 30th July, 1936, on the noted above and to state that you left your job prematurely and hence committed a breach of the condition that a trainee should serve Government for five years after completion of his training. Consequently the cost of training had to be refunded to Government. Government cannot, therefore, consider your representation to set aside the order passed by the Collector and refund to you the amount realised from you.

Yours Faithfully,
sd/-
Assistant Secretary to the Government of Bombay, Agriculture and Rural Development Department.

R.I.No. 9019
20-7-4

Copies to-

The Commissioner, Northern Division, with reference to the correspondence ending with his Unoffical reference No. V. C. 2.-54, dated the 20th January, 1940.

The Collector of Thana, with reference to correspondence ending with No. A. V. R. /1040, dated the 4th April, 1918.

The Remembrancer of Legal Affairs

Office of the R. L. A.

Whether a Government servant is entitled to full pay on Government accepting resignation pending departmental enquiry.

Bombay Civil Services Rules, 151, 152.

It appears that Major Savage Director, C. T.S. allowed a lathe, presumably intended for transmission to Hyderabad, to be stored without proper authority in the G. T. S. workshop. He was accordingly suspended and departmental enquiry is pending against him. In the meanwhile he has tendered his resignation. Secretary, H. D. states in his note dated 30.6. 1948 that H. M. (H) thinks that his resignation might be accepted and the matter be closed on condition that he will not take employment elsewhere without Government's permission. P. and S. D. states that on acceptance of resignation Major Savage can easily repudiate any condition laid down by Government. That Department also states that if the period of his suspension is treated as a penalty under rule 33 of the Bombay Civil Services Conduct, Discipline and Appeal Rules, he would not be entitled to claim anything beyond the sub istence allowance already paid to him even if the departmental enquiry is dropped. The R. L. A. is requested to advise whether this view is correct or whether he can suggest any way whereby the condition 'A' of Secretary, H. D's note dated 30.6. 1948 can be imposed.

2. It is proposed to accept Major Savage's resignation on the condition that he will not take employment, on the ~~condition that he will not take employment~~ without Government's permission. As pointed out by P. and S. D. in its note, dated 9. 7. 1948, at pages 6-7 ante, on acceptance of the resignation Major Savage would be free to repudiate any condition imposed by Government while in service.

~~The law is anxious to maintain the freedom of every~~

. The law is anxious to maintain the freedom of x every individual to enter into any contract but at the same, time, where the Court finds that the contract unduly restrains individual liberty and virtually amounts to slavery, the Court refuses to enforce the agreement on the ground of unreasnablenness or against public policy. Even if, therefore, Major Savage agrees to the imposition of such a condition and an agreement is executed to that effect if may not be possible to enforce such agreement, as being unreasonable.

3. The second question is whether Major Savage will be entitled to claim anything beyong the subsistance allowance already paid to him if his resignation is accepted and the departmental proceedings are dropped. When an order for suspension was passed against Major Savage, presumably an order must have been served on him stating that he is suspended pending departmental enquiry. If, so, Government cannot go back on this order and now say that his suspenkxxsion was a penalty imposed under rule 33 of the Bombay Civil Services services Conduct, Discipline and Appeal Rules. As observed by Warrington L. J. in Wallwork V. Fielding, (1922) 2 K. B, 66 at p.74, "Suspension and disciplinary procedure, followed by punishment, seem to me to be too entirely different things. Suspension is a power which in the nature of things has, if it is to be of any use, to be exercised summarily; procedure resulting in punishment may well be subject

punishment may well be subject to more deliberate and formal process." Consequently, it is not now open to Government to treat the suspension of Major Savage pending departmental enquiry as a punishment imposed under rule 33. Ordinarily suspension of an employee does not amount to dismissal or termination of the contract of service and until the contract of service is terminated he is entitled to his pay even though he is under suspension (see Hanley v. Pease & Partners Ltd. (1915) 1 K. B. 698; Padmakant Motilal v. Ahmedabad Municipality 44 Bom. L. R. 614; Peoples' co-operative Bank Ltd. Patna City v. Rameshwar Prasad Verma 21 Patna 609; Halsbury's Laws of England Vol. 23, p. 183). If however there is a power of suspension and a servant is suspended by his master in exercise of the power, the effect of the order of suspension is to suspend the contract of service as a whole and the servant can neither insist on working nor claim his pay during the period of suspension(see Hallwork v. Fieldin (1932) 2 K. B. 60; Secretary of State v. Surendra Nath Goswami I. L. R. (1939) Cal. 46; Debidutt Dube v. Central India Electrical Supply Co.(1944) Nag. 587). In the case of a government servant when he is suspended he is entitled to subsistence allowance admissible to him under rule 151 of the B. C. S. Rules and after departmental enquiry if he is not re-instated or pending such enquiry his resignation is accepted, as in the present case, he would not, for the reasons stated above, be entitled to anything beyond the subsistance allowance already granted.

sd/-
24/7

OC.
Remembrancer of Legal Affairs.

U. S. to P. and S. D., No. 6952, dated the 26th July 1948.

R. I. No. 10885 dated 30.8.1948.

Submitted.

The post of Deputy Inspector General of Forest in the Ministry of Agriculture has fallen vacant and the Bombay Govt. has been requested to suggest the name of a suitable I. F. S. Officer whose services can be spared and who may be willing to accept the post on the terms mentioned in the letter at p. 1 ante. The two I. F. S. officers in this Province were consulted but both are unwilling to accept the post. R. D. is of the view that in view of clause(1) of the endorsement added to the existing agreement executed by the Officers to send any of its officers against their wishes to the Central Govt. it would be open to the Provl. Govt. The R. L. A. is requested to advise whether this view is correct.

2. R. D. has not forwarded a copy of the existing agreement executed by the I. F. S. Officer in question. Clause(1) of the memo of endoresement executed by him states that he has to continue to serve the Governor or the Governor General as may be required from time to time on the terms and the conditions of the agreement. Clause(2) states that the terms and conditions of the agreement shall have effect in relation to his service under the Governor General as if the said agreement had been made between him and the Governor and the Governor General. Clause(5) provides that he shall if required by the Governor or the governor General enter into a fresh agreement embodying the terms of the agreement and of the memo of endoresement and such other terms as may be naturally agrred upon. It is clear from all these clauses that he has to serve either the Provl. Govt. or the Central Govt. whenever he is so deputed by either of the Govts F. R. 11 clearly states that unless in any case it be otherwise distinctly provided the whole time of a Govt.

— the whole time of a Govt. servant is at the disposal of the govt. which pays him and he may be employed in any manner required by proper authority without claim for additional remuneration etc. There appears therefore no legal objection to sending one of the two I. F. S. Off: to the Central Govt even against his wishes.

sd/-
1/9

A A S

Clause (1) of the memo provides that " the covenantor shall continue to serve the Governor or the Governor General as may be required from time to time on the terms and conditions of the within agreement and of the present agreement". Clause (2) provides that " the terms and conditions of the within agreement shall have effect in relations to the covenantor's service under the Governor or Governor General as if the said agreement hasbeen made between the covenantor and the Governor and the Governor General." Reading these two clauses together along with the preamble, the agreement can betaken to have been executed by the covenantor in favour of the Governor and the Governor General, and consequently so far as the question of service is concerned, the covenantor is also bound to serve the Governor General, if so required. The A. D. office view is correct and the papers may be seen and returned."

sd/-
2/9

A L R Reply may be:- Seen and returned. The view taken by R W is correct, but this point does not appear to arise when the Govt of India wants an I. F. S. officer who is willing to accept the post on the terms mentioned in the letter at p 1 ante.

sd/-
4/9

Office of the H. L. A.

Right to claim salary without performance of duty.

The Bombay Civil Services Rules.

Although Mr. Dodolkar will not be entitled to claim the arrears of salary till the time the proposed fresh Order is passed (of High Commissioner for India V. I. U. Hill, A. I. R. 1949 P. C. 121) nevertheless looking to the small amount of the claim, it would be advisable to refund the amount of Rs. 402-13-0 to Mr. Dodolkar in full satisfaction of his claim and to treat the chapter as closed rather than to pursue the matter and try to recover the amount of Rs. 402-13-0 from him.

sd/-
31/8
O/C
Remembrancer of Legal Affairs.

U. O. to P. & S. D. No. 8388 dated the 1st September, 49

H. R. H
O/C

Office of the R. L. A.

Bombay Civil Services Rules. Appendix LI & LII Effect of a contract

The view taken by Political and Services Department is correct. In view of clause 13 of the agreement Mr. Cadro would be entitled to leave in accordance with rules prescribed in Appendix LI and Appendix LII of the Bombay Civil Services Rules during the period of the contract and the fact that he is a substantive holder of a permanent post in the D. P. E. Clause II would not entitle him to leave under the ordinary rules unless clause 13 of the agreement is amended. Whether that clause 13 should be so amended is a matter for Government to decided in consultation with Mr. Cadro.

sd/-
16/10

S/o. Remembrancer of Legal Affairs.

U. O. to P.W. D. No 0020
Dated 16th October, 1948

L. D. B. I. 6024.
Dated 20-7-1946.

Submitted.

2. The facts of the case are as follows-

A male sweeper Bhoming Baldeo working in Chawl No. 48 at Worli centre was assaulted on 28-3-1946 while he was on his usual round of duties in the said chawl. The incident was due to fetching water from the common watertap by the sweeper for washing purposes to which the alleged assailants objected. The assailants are reported to be the boarders of one Yagirathibai Sadia sub-tenant in room No. 60 of the B. D. Chawl No. 48 at Worli. The Director of the B. D. Chawls informed the Manager of the Chawls that if the party who assaulted the sweeper, is proved to be at fault in a Court of law, the expenditure incurred by the sweeper would be reimbursed by Government. P. W. D. has sent this to H. L. for advice.

3. No specific point of law is raised for H. L. A.'s consideration. Rule 31 of the Bombay Civil Services conduct Discipline and Appeal Rules is as follows:-

" A Government servant may not without the previous sanction of Government, have recourse to any Court or to the Press for the vindication of his public acts or character from defamatory attacks. The granting sanction to recourse to a Court Government will in each case decide whether it will itself bear the costs of the proceedings or whether the Government servant shall institute the proceedings at his own expense, and if so whether in the event of a decision in his favour, Government shall reimburse him to the extent of the whole or any part of the cost incurred by him in excess of the cost and damages if any awarded to him by the Court."

The sanction referred to in the above rule is the sanction of the Department concerned and L. D. is not concerned with it. Neither is this office requested to consider the case on its merits. If approved, these papers may be "seen and returned."

sd/-
9/8

A. S. The papers may be "seen and returned"

sd/-
9/8

A xL R. (I am sorry for the delay in submitting this case. It was not noticed by me) It may be done.

sd/-
2/9

R. L. A.

sd/-
2/9

U. R. to P. W. D. No. 8546 of 9-9-1948

LRR

L. D. E. I. No. 11675, dated 22.9.48.

Submitted.

2. Please see R. L. A's opinion No. 8540, dated 9-9-1948 wherein the action proposed by P. W. D. was approved.

3. Now the President Bombay Sweepers Union states th any sweeper is assaulted by the tenants for any reasons whatsoever while on duty the offender ought to be prosecuted by Govt. and tha the sweeper should not be asked to prosecute the offender. The President has further stated that the sweepers while on duty are fully entitled to protection from Govt. for enabling them to discharge their legitimate duties. P. W. D. doubts whether Govt. c afford to give such protection. R. L. A. is requested to advise.

4. Presumably the protection contemplated by P. W. D. in respect of protecting the legitimate actions of the Govt. Servants performed by them in discharge of the official duties.

Attention is invited to rule 180 of the Law Officers Rules which provides for granting of assistance to Govt. servants who have to institute or defend a suit or criminal proceedings in respect of acts done by them in discharge of their official duties According to sub-section(i) legal assistance may be given to a Govt. servant by engaging a counsel at Govt's expense or reimbursing the officer concerned of the whole or part of the expenses incurr by him. Presumably the contention of the President of the Sweepers Union is that Govt. should engage a counsel rather than reimburse him later on. Hence there seems to be no objection to Govt's tak action under rule 180(i) (a) and (3) of the Law Officers Rules especially because the sweeper would not be able to afford the costs.

It is for the sweeper concerned to lodge a complaint of assault against the person assaulting. Govt. cannot institute such a complaint. As a sweeper would not be financially in a position to engage a council at his own expense, Govt. should give

Govt. should give effective legal assistance by placing at the disposal of the sweeper the services of the P.P.

sd/-
6/10

A.L.I

It is for the sweeper and not for Govt. to prosecute the offender; but Govt can give legal assistance to the sweeper.

sd/-
6/10

R. L. R. sd/-
6/10

(such simple case should not be delayed)

U. R. to P. W. D. No. 9497 dated 9.10.1948.

26

Office of the H. L. A.

Prima facie there appears to be a good case for prosecuting Mr. Saumt for the offences of forgery, cheating and falsification of accounts. The case may be entrusted to the Police for investigation and collection of all relevant evidence. Attention is, however, invited to the remarks at paragraph one of my opinion No. 3- P- Confl., dated 11-9-1947.

sd/-
27/10
Remembrancer of Legal Affairs

U. O. to A. G & R. D. D. No. 833 confl, dated the 28th Oct.,48.

MGR.

Office of the R. L. A.

The view taken by the Jt. Secretary, E & I. D., is correct. One of the modes of termination of the services of a servant is by repudiation of the contract of service. In Freethe v. Burr (1874 9 C. P. at p. 213) Coleridge C. J. laid down the following test: "The true question is whether that acts and conduct of the party evince an intention no longer to be bound by the contract." In laying down a similar test, the Sind Court in Abraham Reuben v. Karachi Municipality (1927, 113 Indian Case 387) held: "The test to determine whether a person has resigned his services or has been dismissed therefrom is whether the acts and conducts of such person evince an intention no longer to be bound by the contract of service." In the present case Mr. Shaikh, while he was in foreign service under the Govt. of India, was deputed to Baluchistan as Superintendent of Education and, after the partition of India, it appears he opted provisionally to serve Pakistan and in December 1947 he made his final choice to serve Pakistan. Apparently this choice was made in exercise of the right given to him-albeit mistakenly-by the Government of India. Unless there be anything to the contrary in the arrangements made by the Government of Indian while granting the right of option by his final choice to serve Pakistan Mr. Shaikh evinced clearly his intention no longer to serve the Govt. of India or the Bombay Proice, the effect of which was resignation of master ans servant between the Govt. of Bombay and Mr. Shaikh.

Sd/-

O. C.

Remembrancer of Legal Affairs

U. R. To E. & I. D. No. 6f5 confl. dated the 20th Oct. 1948.

Office of the A. L. A.

The main question for the consideration of the A. L. A. is whether Mr. Ellias will have any cause of action against Government if his services are terminated as proposed in the draft G. R. at p. 188.

3. Mr. Ellias appears to contend that he is entitled to the benefit of para. 5 of Government Resolution, Health and Local Government Department No. 5305/33 dated the 20 September 1947 Paragraph 5 of that G. R. provides that if, after careful examination by the Medical Officer in charge of the case and of the hospital, the case is declared as 'arrested' and the person is considered fit to carry on his duties, he should be allowed to continue in his appointment under the conditions mentioned in clauses(a) and (b)thereunder. No doubt, Mr. Ellias is an arrested case but the Medical Board, which examined him, is of the opinion that he is unfit to carry on his duties and secondly that, in view of the fact that he is not cured, there is a possibility that he may infect others. The Surgeon General with the Government of Bombay considers that 'as the disease is arrested and not cured, Mr Ellias is not in a fit position xto resume duty as Presidency Magistrate at this present stage. If, however, he is granted the concession mentioned in G. R. H & L. G. D. No. 5305/33, dated the 30th September 1947 for a fairly long time, his chest condition may improve and he might be fit to resume duty but it is not possible to state definitely that he will be in a fit condition to resume his duties after that period.' It is clear from these reports that Mr. Ellias, though his disease is arrested, is considered unfit to carry on his duties. The fact that he discharged his duties as Presidency Magistrate for over a year after his disease was reverted to be arrested is not a sufficient and valid ground for holding him to be fit to carry on his duties

in view of the medical evidence now available. Further the grant of the benefit of concessions under the G. R. H & L. G. D. No. 5305/33 dated 30th September 1947 is a matter of discretion of Government and no Government servant can as aright claim such benefit. Mr. Ellias is not thus entitled to the benefit of that G. R. firstly because after the disease was reported to be arrested he is considered to be unfit for resuming his duties and secondly because it is a matter of discretion for Government whether or not to extend that concession in a particular case if such concession would not enable the Government servant to render himself fit even after treatment to resume his duties.

3. Thenext question is whether the services of Mr Ellias can be terminated. Two possible methods of terminating his services suggest themselves. The first is by recourse to rule 14(a) of the Bombay Civil Services Rules which provides that no person who has already completed six months' temporary (including officiating) service in the employment of Government shall be continued in employment without production of a medical certificate in the form given inrule 11. The service put in by Mr. Ellias before he was appointed Presidency Magistrate in 1944 was service as a police Prosecutor on a contractual basis. The G. R. No. 812/3-IX dated 5-12-1934, which deals with the appointments of Police Prosecutors on contract makes no reference to medical fitness, and it is, therefore, doubtful whether rule 14(a) can be held to apply to Mr. Ellias's service as a police Prosecutor. The Rule would no doubt have come into play after Mr. Ellias was appointed a Presidency Magistrate in 1944. But the plain meaning of the rule is that no person shall be continued after six months unle

~~A person shall be continued after six months unless~~ he produces a certificate, that in other words, after the expiry of the period he must either be discharged or must produce a certificate. The intention of the rule is that the person must be medically fit at the time he enters upon his service and ~~xxx~~ he is given the latitude of proving that fact within six months of joining service. The rule is not intended to apply to cases where the disease is contracted after the period of six months has expired. If Government are not diligent in insisting on the enforcement of the rule, and allow the person to continue in temporary service for a considerable period during which period he contracts a malady, it would, in my opinion, be unfair to insist on the production of a medical ~~certi~~ certificate as a condition pre-requisite on his continuance in service, and on his failure to produce such certificate, to discharge him. It is arguable that by their inaction in not demanding the certificate at the proper moment, Government have waived the enforcement of the rule.

✓ Omission

4. The other method may perhaps effectively achieve the purpose. Although Mr. Elliss was, after his first leave, allowed to resume duty on 23-2-1948 ~~xxxxxxxxx~~ (presumably without the production of a fitness certificate as required by rule 641) he again went on leave - it may be at the suggestion of Government - from the 29th of March 1948, and it appears that he has not resumed duty so far. He would still be required to produce a fitness certificate under rule 641 before he resumes duty. Apparently, having regard to the medical opinion he will not succeed in securing such certificate, and it will, therefore, be impossible for him to resume duty. I am given to understand that there have been instances in the past where even permanent Government servants who were unable to produce a fitness certificat under rule

certificate under rule 641 have been made to retire compulsorily. Perhaps, the Finance Department may be able to show the authority for that course.

sd/-

O. C.

Remembrancer of Legal Affairs.

U. R. To H. D. No. 9950 dated 25th October 1948.

. D. R. I. No 14799, dt, 6-11-1948.

Submitted.

These papers pertaon to the resignation of Mr. More who was serving as a temporary, clerk in H.& L. G. D. from 7-10-47 to 10-9-48. On 11-9-48 he submitted his resignation and remained absent from the same date. The question for R. L. A's consideration is whether the 10 days' salary due to Mr. More should be forfeited to Govt. as he did not give one month's notice. P. & S. D. think that though it is an established convention that 1 month's notice should be given, it cannot be insisted upon unless it is specifically provided for in the terms of employment of the person concerned. No definite terms of employment seem to have been agreed upon in the case of Mr. More.

Where a servant is guilty of a breach of the contract of service the master is entitled to recover the damages. There is a breach of the contract whenever the servant leaves his service without just cause or excuse before the expiration of the agreed term or when no term has been fixed for the duration of the contract without giving due notice. In the absence of any express provision in the contract to the effect that th master may retain any wages due to the servant at the time of the breach, as liquidated damges, the master remains liable notwithstanding the servant's breach of contract to pay him any wages already accrued due and remained unpaid at the date of the breach, since the servant's right to payment is not affected by the subsequent breach where however no wages have accrued due at the time of the breach or of the dismissal, as the case may be, the servant is not entitled to claim remuneration in respect of the services already rendered, unless there is an agreement to that effect. (Halsbury's Vol 23 pp. 161-2).

In his opinion No. 290 dated 12th ~~xxxx~~ January, 1948

H. L. A. has held that Ordinarily a month's notice on either side is necessary to terminate the services of t temporary Govt. servant. Similarly, in his opinion No. 1427, dated 20-2-46, H. L.A. agreed with the opinion of the G. P., H. C. that one Mr. O who was working as an overseer under the Ex. Engr., Road Projects Division (North) Bombay from 10-12-44 to 20-1-45 and who submitted resignation on 20-1-45 after office hours and remained ab from 21-1-45, was not entitled to any salary for the bro portion of the month of January 1945. In this case G. P. had also pointed out that Govt. would also be entitled to claim damages for breach of contract of service. In his opinion No. 5801, dated 24-8-46 H. L. A. has again held as follows :-

If the servant leaves Government's servic without a month's notice before his pay for the month has ~~xxxxxx~~ accrued, Government would be entitled to forefeit his salary for the broken period of the month and also to damages. Those damages would be such as are reasonable and the probable consequence of the servant's breach of contract, including any expenses which Govern- ment may be compelled to incur (see Halsbury Vol. xxII p. In Malli Bros. V. Ambika Prasad, I. L. R. (Allahabad) 132, Tudball J. held that an office clerk engaged on a monthly is not entitled to any salary for the broken portion of a month in the course of which he leaves his service withou the consent of his employer. In Ranji Vs. E. L. D. Little 10 Bom. H. C. R. 57 where ~~xx xxxxx~~ a servant who was enga by the month, served from the 1st November to 3rd Decembe ber 1872 and left his master's service on the 4th December without giving notice, it was held that the servant was entitled to be paid his wages up to the end of Novembe b

~~his wages up to the end of November but~~ forfeited ~~the~~ the wages payable to him in respect of his December Services. Also see in this connection pages 217-8 of Sarkar's Law of Master of Servant.

Judging the authorities stated above it would be correct to hold that in this case H. & L. G. D. would be right in forfeiting Mr. More's 10 days' salary for the month of September 1948 as the latter failed to give one month's notice.

sd/-
15/11
A. A. S.

" A contract of service is continuing in its nature and its continuance and the obligations under it can ~~can~~ be terminated in certain defined modes. Mere resignation obviously is not enough unless it be assented to or unless it comply with those terms which the law implies or the prior agreement of the parties may permit" (Ganesh Ram Chandra v. Gt.I. P. Rly. 2 Bom. L. Rp 790 at p. 792). In the present case, resignation dated 11-9-48 has not satisfied any of these conditions. By absenting himself from duty, Mr. More did not terminate his contract of service; all ~~the~~ he did was to give intimation to Government that he did not intend to perform the service which he was bound to perform ~~the service which he was bound to perform.~~ In view of the intimation given, Govt. may determine the contract and dismiss Mr. More.

A contract of service and hiring may be terminated by notice in accordance with the express or implied agreement between the parties. If there is no custom or stipulation by the parties as to notice and if the contract of service is not one which can be regarded as a yearly one, it is terminable by reasonable notice, and even if the parties made no stipulation as to noice, a term must be implied that reasonable notice

~~that reasonable notice~~ should be given.

When a servant who was engaged by the month served from 1st November to 3rd December 1942 and left his master's service on the 4th December without giving notice, Koot-Kopp C. J. and Stvill J held that the servant was entitled to be paid his wages upto the end of November, not forfeited the wages payable to him in respect of his December services (Manji Khoor v. F. D. Little, 0 D.U. C. 3. 67) When a servant whose wages are due periodically leaves service without legal justification or without notice, he is not entitled to be paid for the portion of the time during which he served since the last periodical payment (35 All 133; 37 M. C. (Ind) p. 677). There is therefore, no objection to forfeit Mr. Bhra's salary for the ten days of September during which he served after the last periodical payment for the month of August was made. The course proposed by the D. S. H. & L. G. D. in para. 3 of his note dated 29-9-48 appears to be free from legal objection.

Sd/-
17/--

AIR Reply may be:- There would be no legal objection to forfeiting the salary of Mr. Bhra for the period from 1-9-1948 to 11-9-48 (see AIA's opinion No.5801 dated 24-3-1948.)

Sd/-
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H. L. A. Sd/-
19/11

U. S. to H. & L. G. D. No. 10000 dated 30-11-1948.

MM.